Sulnayah bte Hj Mohd Isa v Sekolah Kanak-Kanak Pekak Selangor & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2-25-62 OF 1998

AZMEL J

16 MARCH 1999

Labour Law *— Employment — Termination of service — Termination before expiry of probationary period — Unsatisfactory performance — Whether misconduct — Whether with just cause and excuse*

The applicant was appointed as a teacher in the respondent's school with effect from 12 June 1995. According to the letter of offer, she was to undergo a period of probation between three months and one year before she could be confirmed in her post. By letter dated 4 February 1996, the respondent informed the applicant that she was given one month to improve her performance. However, by letter dated 26 March 1996, the applicant was dismissed with effect from 27 March 1996 on the ground of her unsatisfactory performance as appraised by the respondent before the expiry of her probationary period. The applicant's dismissal was referred to the Industrial Court where it was held that the dismissal was with just cause and excuse. The applicant made an application for an order of certiorari to quash the award of the Industrial Court on the ground that the Industrial Court had committed errors of law.

Held, allowing the application:

(1) An employee cannot be terminated by the employer during the currency of his probationary period unless the employee commits an act of misconduct for which reason even the services of a confirmed employee can be terminated. In the present case, the unsatisfactory performance of the applicant did not come within the meaning of misconduct. Misconduct, which can also be used as a ground to dismiss a permanent employee, connotes an act of non-disciplinary/behaviour. As such, it is highly inconceivable how the Industrial Court could conclude that the unsatisfactory performance of the applicant could come within the meaning of an act of misconduct and then rule that the respondent's act in dismissing the applicant before the expiry of her probationary period was with just cause and excuse. In making such ruling, the Industrial Court had committed a serious error of law (see p 254B–G).

(2) The act of the respondent in issuing the letter dated 4 March 1996 asking the applicant to enhance her performance within a period of one month should be regarded as completely insincere and without bona fide. Even before the expiry of the one month period, the respondent issued another letter dismissing her

services. It is clear that this letter was issued in bad faith. Further, the applicant was on probation for a minimum period of one year, yet after only nine months, she was dismissed. These are material facts which the Industrial Court should consider in arriving at its award. The failure of the Industrial Court to consider these material facts tantamount to an error of law which can be a ground to quash the award (see p 255A–255C).

(3) The Industrial Court also failed to make a ruling on the conflicting grounds of dismissal. It was incumbent upon the Industrial Court to make a ruling which ground to be believed. The failure of the Industrial Court to make such ruling on the facts given was an error of law (see 255H).

[Bahasa Malaysia summary

Pemohon telah dilantik sebagai guru di sekolah responden mulai 12 Jun 1995. Menurut surat tawaran tersebut, beliau akan menjalani suatu tempoh percubaan antara tiga bulan hingga setahun sebelum beliau boleh disahkan ke jawatannya. Melalui surat bertarikh 4 Februari 1996, responden telah memberitahu pemohon bahawa beliau telah diberi sebulan untuk memperbaiki prestasinya. Tetapi, melalui surat bertarikh 26 Mac 1996 pemohon telah dipecat mulai 27 Mac 1996 atas alasan prestasi yang tidak memuaskan seperti yang dinilai oleh responden sebelum tempoh percubaan tamat. Pemecatan pemohon telah dirujuk kepada Mahkamah Perusahaan di mana diputuskan bahawa pemecatan tersebut adalah dengan sebab dan alasan yang adil. Pemohon telah membuat permohonan untuk suatu perintah certiorari utnuk mengketepikan award Mahkamah Perusahaan atas alasan bahawa Mahkamah Perusahaan telah melakukan kesilapan undang-undang.

Diputuskan, membenarkan permohonan tersebut:

(1) Seorang pekerja tidak boleh ditamatkan oleh seorang majikan semasa tempoh percubaannya kecuali jika pekerja tersebut telah melakukan salah laku di mana perkhidmatan seorang pekerja yang telah disahkan juga boleh ditamatkan. Di dalam kes ini, prestasi pemohon yang kurang memuaskan tidak terjatuh di dalam maksud salah laku. Salah laku, yang juga boleh digunakan sebagai alasan untuk memecat seorang pekerja tetap, menggambarkan suatu tindakan yang kurang berdisiplin. Oleh itu, tidak dapat difahami bagaimana Mahkamah Perusahaan dapat menyimpul-kan bahawa prestasi yang kurang memuaskan pemohon adalah terjatuh di dalam maksud suatu tindakan salah laku dan kemudian memutuskan bahawa tindakan responden di dalam memecat pemohon sebelum tamat tempoh percubaan adalah dengan sebab dan alasan yang adil. Di dalam membuat

keputusan tersebut, Mahkamah Perusahaan telah melakukan kesilapan undang-undang yang serius (lihat ms 254B–G).

(2) Tindakan responden di dalam menulis surat bertarikh 4 Mac 1996 meminta pemohon untuk membaiki prestasinya dalam sebulan boleh dianggap sebagai tidak ikhlas langsung dan tidak bona fide. Sebelum luputnya tempoh sebulan tersebut, responden telah mengeluarkan sepucuk surat lagi menamatkan perkhidmatannya. Adalah jelas bahawa surat tersebut telah dikeluarkan dengan niat jahat. Selanjutnya, pemohon masih dalam tempoh percubaan minima selama setahun, tetapi selepas sembilan bulan, beliau telah dipecat. Ini adalah fakta-fakta material di mana Mahkamah Perusahaan patut mempertimbangkan di dalam mencapai award-nya. Kegagalan Mahkamah Perusahaan untuk mempertimbang-kan fakta-falta material ini terjumlah kepada kesilapan undang-undang yang boleh merupakan alasan untuk mengketepikan award tersebut (lihat ms 255A–255C).

(3) Mahkamah Perusahaan tersebut juga gagal untuk memutuskan mengenai alasan pemecatan yang bercanggah. Adalah kewajipan Mahkamah Perusahaan untuk memutuskan alasan mana yang patut dipercayai. Kegagalan Mahkamah Perushaan untuk memutuskan sedemikian berdasarkan fakta yang diberikan adalah suatu kesilapan undang-undang (lihat ms 255H).]

Notes

For cases on termination, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 943–976.

Cases referred to

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317 (refd)

Legislation referred to

Industrial Relations Act 1967 s 20(1)

S Shanker (*P Kuppusamy & Co*) for the applicant.
Hasnal Rezua (*Shafee & Co*) for the first respondent.

Azmel J: The applicant in this application was appointed as a teacher in Sekolah Kanak-Kanak Pekak Selangor, ('the first respondent') with effect from 12 June 1995. She was, however, dismissed on 26 March 1996 while still undergoing the period of probation. According to the letter of offer she was to undergo a period of probation between three months and one year before she could be confirmed in her post. In the event she could not be confirmed during that probationary period her services might be terminated or further extended for a maximum period of three years. The applicant was

dismissed after having served the school for a period of just over nine months.

As a result of her making representations for wrongful dismissal to the Industrial Relations Department under s 20(1) of the Industrial Relations Act 1967, her matter was referred to the Industrial Court for an award. At the hearing the Industrial Court ruled that the dismissal of the applicant by the first respondent was with just cause and excuse and as such her dismissal was upheld. The reasons for such ruling are contained in the Industrial Court Award No 254 of 1998 dated 23 May 1998.

It was against this award of the Industrial Court that the applicant made this application for an order of certiorari to quash the said award and also for an order of mandamus to direct the registrar of the Industrial Court to have this matter be heard before another branch of the Industrial Court. The applicant alleged that the Industrial Court in making the award had committed errors of law.

In the light of such application it is incumbent upon me to examine the award and other relevant documents with a view to determine whether in fact the Industrial Court had committed any errors of law in arriving at the said Award.

In my consideration of this application, I found two letters produced at the hearing before the Industrial Court to be of great relevance. The first was a letter issued by the first respondent to the applicant dated 4 February 1996 stating that the applicant was given one month to improve her performance. It reads as follows:

Tarikh: 4 Mac 1996

Puan Sulnayah bte Mohd Isa
Sekolah Kanak-Kanak Pekak Selangor
Lot 2A & 2B, Jalan SS5D/6
47301 Kelana Jaya
Petaling Jaya
Selangor Darul Ehsan

Melalui: Pengetua
dan Sekolah Kanak-Kanak Pekak Selangor
Salinan

Puan,

Per: Pengesahan Puan dalam jawatan sebagai guru

Adalah saya diarah merujuk kepada perkara di atas sukacita dimaklumkan kepada puan bahawa Jawatankuasa Lembaga Pengelola Sekolah yang telah bersidang pada 9 Februari 1996 telah tidak dapat mengesahkan puan dalam jawatan sebagai guru di sekolah ini kerana laporan yang diterima ke atas puan adalah tidak memuaskan.

2 Sehubungan dengan perkara ini puan dinasihatkan supaya mempertingkatkan tugas-tugas puan dalam masa satu bulan lagi.

Bersama-sama ini disertakan salinan SKPS/LPS/96/PK iaitu syarat-syarat tawaran jawatan untuk panduan dan dipatuhi oleh puan.

Sekian, terima kasih.

Yang menjalankan tugas
Bagi pihak Lembaga Pengelola Sekolah

KS Maniam
Pentadbir Sekolah

The second letter, dated 26 March 1996 was also issued by the first respondent to the applicant indicating that the applicant was dismissed wef 27 March 1996. It reads as follows:

Tarikh: 26 Mac 1996

Dengan tangan

Puan Sulnayah bte Hj Mohd Isa
Sekolah Kanak-Kanak Pekak Selangor
Jalan SS5D/6, Kelana Jaya
Petaling Jaya
Selangor Darul Ehsan

Puan,

Notis penamatan perkhidmatan sebagai guru (masih dalam percubaan) di Sekolah Kanak-Kanak Pekak Selangor, Kelana Jaya

Adalah saya merujuk kepada perkara di atas ingin memaklumkan bahawa perkhidmatan puan sebagai guru (masih dalam percubaan) di sekolah ini adalah ditamatkan mulai 27 Mac 1996 dengan bayaran sebulan gaji sebagai ganti notis.

2 Bersama-sama ini disertakan cek berpalang bernombor BBM 323430 bernilai RM460.75 bagi bayaran gaji untuk satu bulan.

3 Ahli Lembaga Pengelola Sekolah ini mengucapkan terima kasih atas perkhidmatan puan di sekolah ini selama sembilan bulan.

Sekian, terima kasih.

Yang benar,

Datuk Paduka Hjh Saleha Mohd Ali
Pengerusi
Lembaga Pengelola Sekolah

The main issue that arose from this application concerned with the right of an employer to dismiss its employee during the period of probation. It was not disputed that the applicant was dismissed by the first respondent during the currency of her probationary period. At p 3 of the award the Industrial Court had quite rightly stated the legal principle concerning this issue, ie:

> In other words the employer has no right to terminate the service of an employee before the period of probation has expired, except on the ground of misconduct or other sufficient reasons in which case even the service of a permanent employee could be terminated.

This principle means that an employee cannot be terminated by the employer during the currency of his probationary period. However there is an exception to the rule, ie the employee can be terminated if he commits an act of misconduct for which reason even the services of a confirmed employee can be terminated.

In the light of the above principle, what this court need to examine is whether the dismissal of the applicant who was still on probation was on the ground of misconduct. Quite rightly, as stated by the Industrial Court, the onus of proving that the dismissal was on the ground of misconduct lay on the employee ie on the first respondent. At the hearing before the Industrial Court the first respondent called only one witness, COW1, the principal of the school. The gist of the evidence of COW1 was that the applicant's performance was well below standard. On an appraisal of performance done on the applicant in January 1996 she was given 53% mark, well below the 70% average mark required to be a permanent teacher in the first respondent's school. In other words the dismissal of the applicant, according to COW1, was on the ground of her unsatisfactory performance as appraised by the first respondent before the expiry of her probationary period. The letter dated 4 March 1996 issued by the first respondent to the applicant also talked about the poor performance of the applicant.

I am of the view that unsatisfactory performance of the applicant does not come within the meaning of misconduct as mentioned in the above said principle. Misconduct, which can also be used as a ground to dismiss a permanent employee, connotes an act of *non-disciplinary behaviour*. As such it is highly inconceivable how the Industrial Court could conclude that the unsatisfactory performance of the applicant could come within the meaning of an act of misconduct and then rule that the first respondent's act in dismissing the applicant before the expiry of her probationary period was with just cause and excuse. In making such ruling, the Industrial Court had committed a serious error of law.

In my view, it was unfair and improper for the first respondent to prejudge the performance of the applicant before the expiry of her probationary period. The applicant should be given the opportunity to complete her probationary period. She had been denied of this opportunity. The first respondent had breached what it had already agreed to do.

If it was found that the applicant's performance at the expiry of her probationary period was unsatisfactory then it would be only proper and in fact it would be expected that the first respondent should consider giving the necessary assistance and cooperation to enable the applicant to improve her performance including extending her probationary period in order to enable her to achieve the standard of performance required. The act of the

first respondent of issuing a letter dated 4 March 1996 asking the applicant to enhance her performance within a period of one month should be regarded as completely insincere and without bona fide. Even before the expiry of the one month period the first respondent issued another letter dated 26 March 1996 dismissing her services. It is clear that this letter was issued in bad faith.

The first respondent committed two premature acts against the applicant. Firstly, the applicant was given one month to improve her performance. Yet before the expiry of one month she was dismissed. Secondly, she was on probation for a minimum period of one year. Yet after only nine months she was dismissed. These are material facts which the Industrial Court should consider in arriving at its award. The failure of the Industrial Court to consider these material facts tantamount to an error of law which can be a ground to quash the award (see *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317).

Having regard to the circumstances of the applicant's dismissal as discussed above I was more inclined to believe the version given by the applicant as stated at pp 8 and 9 of the award. Yet the Industrial Court completely refused to believe the applicant's version. There were a number of facts revealed which tend to be consistent with the truth of the applicant's story. There was no acknowledgement of receipt by the applicant of the warning letter dated 4 March 1996. The claimant alleged that no warning letter regarding her unsatisfactory performance had been served on her. Even assuming that the letter was received by the applicant, why the need to attach a copy of the terms of offer of the job if it had been given earlier. I was more inclined to believe that no such terms of offer had been given to the claimant earlier. Therefore it might be true that the applicant did not know that she was on probation and for how long was her probation. On the other hand, the first respondent's witness, COW1 had stated in her evidence that the claimant had quarreled with other staff members and that her husband had come to the school purportedly to protect her against other teachers. COW1 further stated that the situation did not permit the applicant to stay any longer at the school and as a result the applicant was dismissed. If this incident had taken place, it could be a case where the claimant was dismissed because she had trouble with the other staff and not because of poor performance. But the letter dated 4 March 1996 clearly stated that the school was not satisfied with her performance and asked her to improve within one month. It would appear that there are two conflicting grounds of her dismissal. In such a situation it was incumbent upon the Industrial Court to make a ruling, which ground to be believed. No such consideration had been made by the Industrial Court. The failure on the part of the Industrial Court to make such ruling on the facts given is an error of law.

In the light of the above errors of law committed by the Industrial Court in arriving at the said award I was of the view that the application to quash the award be granted.

I therefore allowed the application with costs. The Registrar of the Industrial Court is hereby directed to place this matter before another Chairman of the Industrial Court for a rehearing.

Application allowed.

Reported by Jafisah Jaafar